IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT MAYORGA, Plaintiff, v. COSTCO WHOLESALE CORPORATION, a Washington corporation, Defendant.	No. CV-06-882-HU OPINION & ORDER

Michael B. Mendelson
LAW OFFICES OF MICHAEL B. MENDELSON
650 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204

Attorney for Plaintiff

Steven D. Olson
TONKON TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204-2099

Attorney for Defendant

HUBEL, Magistrate Judge:

Plaintiff Robert Mayorga brings this negligence and "outrageous conduct" action against defendant Costco Wholesale Corporation, arising out of a purchase of alcohol made by plaintiff

at defendant's store in Redding, California.

Defendant moves for summary judgment. Plaintiff moves to amend the complaint to add a claim of indemnity. Both parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the summary judgment motion and deny the motion to amend.

BACKGROUND

The parties have stipulated to the following facts, although defendant makes clear that its stipulation is for the purposes of summary judgment only and it will contest the asserted facts if the summary judgment motion is denied. Thus, for the summary judgment motion, defendant stipulates to the following facts:

Plaintiff's Fact No. 1: Robert J. Mayorga and his wife were vacationing in California in April, 2006. While returning from their vacation in California, Mr. Mayorga, a Costco Wholesale Corporation member, stopped at the Costco warehouse store in Redding, California, on April 14, 2006, because he understood that alcoholic beverages were less expensive in California than in Oregon.

Plaintiff's Fact No. 2: Mr. Mayorga's stepson was being married in September and Mr. Mayorga, being in California anyway, decided to take the opportunity to purchase alcoholic beverages at Costco's low prices and buy several cases of distilled alcoholic beverages for the wedding and to bring home to other family members. Mr. Mayorga purchased $1,066.65 worth (including $72.10 tax) of wine and distilled spirits at the Redding Costco warehouse store.

Plaintiff's Fact No. 3: Costco chose to locate a warehouse store in Redding, California, and the particular location of that store in Redding, on many factors, including its proximity to Interstate 5 and the interstate travel patterns of its members. Costco intended for its Redding warehouse store to attract interstate travelers and vacationers such as Mr. Mayorga. Costco knew that a substantial number of those interstate travelers were Oregonians and almost all interstate travelers northbound from Redding would cross into Oregon.

Plaintiff's Fact No. 4: Costco had actual knowledge of the provisions of the Oregon Liquor Control Act (OLCA), including the provisions of Oregon Revised Statute § (O.R.S.) 471.450 limiting the importation of alcoholic beverages into Oregon.

Plaintiff's Fact No. 5: Costco knew the Oregon Liquor Control Commission (OLCC) published a monthly list of the prices it charged for alcoholic beverages and considered that list in setting its own prices. Costco knew it would be able to price its alcoholic beverages to undersell the OLCC and deliberately marketed its alcoholic beverages in competition with the OLCC.

Plaintiff's Fact No. 6: The OLCC had communicated with Costco expressing concern about Costco's sale of alcoholic beverages to persons transporting their Costco purchases to or through Oregon in violation of the OLCA.

Plaintiff's Fact No. 7: Costco knew persons transporting more than two cases of wine, two cases of malt beverage, or four liters of distilled liquor not procured from or through the OLCC into Oregon, were in violation of O.R.S. 471.450 and committing a crime punishable as a misdemeanor.

Plaintiff's Fact No. 8: Costco made a deliberate decision not to warn its members of the risk of transporting alcoholic beverages into Oregon. A significant factor in Costco's decision not to warn its members of the risk of transporting alcoholic beverages into Oregon was Costco's concern that such warnings would adversely affect its sales, including the sale of alcoholic beverages.

Plaintiff's Fact No. 9: Costco uses extensive computer technology to track purchases by its members and the sale of its products, including breakdowns in demography and by the product purchased. Mr. Mayorga is a Costco member and all of his personal and purchase information are contained in Costco's computer system and readily accessible at any check out register. Costco has readily accessible data concerning the type and amount of alcoholic beverages sold to its members and the demographics of the purchaser and tracks the sale of alcoholic beverages to best target potential purchasers.

Plaintiff's Fact No. 10: Costco knows out-of-state members shopping at the Redding warehouse store, especially Oregonians, constitute a substantial part of the alcoholic beverage market at the Redding warehouse store for the sale of alcoholic beverages.

Plaintiff's Fact No. 11: Costco's computer system can easily be programmed with relatively little expense to print messages on its sale receipts. Costco's computer system can also be easily programmed with relatively little expense to notify its cashiers to take particular action for a particular sale, such as asking for identification when alcoholic beverages are sold, which it already does.

Plaintiff's Fact No. 12: Under California law, Mr. Mayorga's

purchase required Costco to have him fill out a certification that "all alcoholic beverages purchased by me at Costco are for personal consumption and are not for any type of resale." Mr. Mayorga was purchasing the alcoholic beverages for his personal use and not for resale and signed the form presented by Costco.

Plaintiff's Fact No. 13: Mr. Mayorga believed he was in full compliance with the law and loaded the cases of spirits openly into the back of his pick-up truck. He did not raise the tailgate of his truck or make any attempt to cover or conceal his purchase, believing he was in full compliance with the law since the alcoholic beverages were not going to be resold. To Mr. Mayorga, the alcoholic beverages purchased were just another commodity and he had no reason to believe entering Oregon with his purchase constituted a criminal act under the provisions of the OLCA.

Plaintiff's Fact No. 14: There were no warning signs or postings at Costco or elsewhere that bringing into Oregon more than four liters per adult of distilled spirits not purchased from the OLCC was a violation of Oregon law, much less a crime.

Plaintiff's Fact No. 15: On April 14, 2006, at approximately 8:30 p.m., Mr. Mayorga was stopped for exceeding the speed limit by an Oregon State Police Officer near Sutherlin, Oregon. The officer observed the cases of alcoholic liquor in plain sight in the back of the truck and placed Mr. Mayorga under arrest. The officer, upon information from an OLCC representative, was instructed to seize all of the liquor, and Mr. Mayorga was cited and released on his own recognizance. After amendment of the original citation, Mr. Mayorga was prosecuted for violation of O.R.S. 471.405(2), alleging that "[t]he said defendant on or about April 14th, 2006,

in Douglas County, Oregon, did unlawfully and knowingly transport or import alcoholic liquor not procured from or through the Oregon Liquor Control Commission, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon." Violation of O.R.S. 471.450(2) is punishable as a misdemeanor under O.R.S. 471.990.

Plaintiff's Fact No. 16: Mr. Mayorga was required to appear for arraignment in Roseburg, Oregon and had to retain an attorney at substantial expense to defend him. Mr. Mayorga's attorney was compelled in the course of conducting Mr. Mayorga's defense, to file legal objections, memoranda of law, and appear for oral argument in Roseburg.

STANDARDS

I. Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)

(quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

II. Amendment

Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." The court should apply the rule's "policy of favoring amendments with extreme liberality." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (internal quotation omitted). In determining whether to grant a motion to amend, the court should consider bad faith, undue delay, prejudice to the opposing party, futility of amendment, and prior amendments to the complaint.

Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 355-56 (9th Cir. 1996). Delay, by itself, will not justify denying leave to amend. DCD Programs, 833 F.2d at 186.

DISCUSSION

I. Choice of Law Issue

Although the parties rely on different reasoning, they agree that Oregon law controls the case. I agree Oregon law applies because there is no difference in the outcome of the case whether applying Oregon or California law. Patton v. Cox, 276 F.3d 493, 495 (9th Cir. 2002) (when deciding conflict of law questions based on state law claims, the district court applies the conflict of law principles of the forum state); CollegeNET v. Xap Corp., No. CV-03-1229-HU, 2004 WL 2303506, at *13 (D. Or. Oct. 12, 2004) (under Oregon law, if there is no material difference between the substantive law of Oregon and the law of other forum, there is a "false conflict" for purposes of the choice of law and Oregon law applies).

II. Summary Judgment Motion

A. Negligence Claim

Defendant argues that it is entitled to summary judgment on plaintiff's negligence claim because:

(1) defendant had no duty to warn plaintiff given the absence of a special relationship between the parties and the fact that plaintiff seeks economic damages only;

(2) even if there was a duty, defendant did not breach it because (a) the hazard was obvious; (b) the standard of care does not require such warnings; and (c) the risk of harm was not reasonably foreseeable; and

(3) any lack of warning was reasonable.

I agree with defendant that the law in Oregon is such that to sustain a negligence claim in which only economic damages are alleged, the plaintiff must show the existence of a special relationship between the parties. Although the concept of "duty" in Oregon negligence claims has only limited application since the Oregon Supreme Court's decision in Fazzolari v. Portland Sch. Dist. No. 1J, 303 Or. 1, 734 P.2d 1326 (1987), duty remains an issue when the plaintiff seeks damages for purely economic losses. Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP, 336 Or. 329, 341, 83 P.3d 322, 328 (2004).

> One ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property. . . . Instead, the plaintiff is required to allege some source of a duty outside the common law of negligence. . . . [L]iability for purely economic harm must be predicted on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm.

Id. (citations and internal quotations omitted).

I further agree with defendant that there is no special relationship between the parties. All of the allegations and evidence bespeak of only an arms-length transaction between a retailer and a consumer and nothing more. Such a relationship is not "special" as that term has been defined in the context of Oregon negligence law. E.g., Conway v. Pacific Univ., 324 Or. 231, 239-41, 924 P.2d 818, 823-24 (1996) (listing types of relationships in which one party owes the other a duty to exercise reasonable care beyond the common law duty to prevent foreseeable harm); Onita Pacific Corp. v. Trustees of Bronson, 315 Or. 149, 160-62, 843 P.2d 890, 896-97 (1992) (same).

Moreover, contrary to plaintiff's contention, I do not read Onita or Conway to suggest any variation to the rule that the existence of a special relationship is required to prevail in a negligence claim where only economic harm is alleged. I note that here, unlike in Onita, plaintiff has not pleaded a misrepresentation claim of any kind, but rather, has pleaded only a negligence claim. The Complaint, and even the proposed Amended Complaint, contain no intimation of a fraud or intentional misrepresentation claim. This case concerns only a straightforward claim for negligence, based on defendant's failure to inform plaintiff of Oregon liquor laws.

Nonetheless, while I agree with defendant on the elements of the law, I cannot grant summary judgment to defendant based on this particular argument because I do not view the allegations as asserting a claim for only economic damages. In the context of Oregon negligence claims, "economic losses" are distinguishable from damages for injury to person or property. See, e.g., Onita, 315 Or. at 159 n.6, 943 P.2d at 896 n.6 ("we use the term 'economic losses' to describe financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injury to person or property.") (emphasis added).

Although most of the damages sought by plaintiff are economic, (for example, the cost of hiring an attorney to defend him in the underlying criminal case), I cannot agree with defendant that the confiscation of his property by the police is not an "injury to property" requiring plaintiff to prove a special relationship in support of his negligence claim.

Defendant notes that O.R.S. 31.710(2)(a) defines economic

damages as including the "reasonable and necessarily incurred costs due to the loss of use of property and reasonable costs incurred for . . . replacement of damaged property." Defendant argues that this definition supports its argument that plaintiff claims nothing more than economic damages in his negligence claim.

I reject this argument because the cited definition was adopted as part of a tort reform statute designed to limit certain damages.[1] Defendant has provided no basis for me to read into this statute a legislative intent for the cited statutory definition to control the common law developed by the Oregon courts in regard to the application of the "special relationship - economic loss only" negligence claim context. Thus, on the record before me, I assume that plaintiff's damages allegations may present something more than economic harm.

Nonetheless, I grant summary judgment to defendant based on defendant's arguments that the hazard was obvious and that plaintiff has failed to show that defendant breached the relevant standard of care.

First, it is generally the law in Oregon that a duty to warn is owed only as to risks that are not generally known or obvious. See Crosswhite v. Jumpking, Inc., 411 F. Supp. 2d 1228, 1235 (D. Or. 2006) (manufacturer not liable for "unreasonably dangerous product" on a failure to warn theory when the danger is "'open or

[1] Subsection (1) of the statute, originally passed as O.R.S. 18.560, which limits the amount of damages, was declared unconstitutional by the Oregon Supreme Court in Lakin v. Senco Products, Inc., 329 Or. 62, 987 P.2d 463, clarified, 329 Or. 369, 987 P.2d 476 (1999).

obvious' or 'generally known and recognized'") (quoting Gunstone v. Julious Blum GMbH, 111 Or. App. 332, 336, 825 P.2d 1389 (1992) (holding that jury instruction used by trial court properly stated law that if the jury were to find that the danger presented by a drill press was generally known and recognized, then the manufacturer had no duty to warn of that danger and the machine was not unreasonably dangerous due to a lack of warning)); see also Benjamin v. Wal-Mart Stores, Inc., 185 Or. App. 444, 454, 61 P.3d 257, 264 (2002) (citing comment j to Restatement (Second) of Torts § 402A for proposition that seller is not required to warn with respect to products when the danger, or potentiality of danger, is generally known and recognized).

Defendant argues that the "hazard" here is generally known and obvious because all citizens are required to know and comply with the law and defendant was entitled to presume that plaintiff would act lawfully. Or. Evid. Code 311 ("(1) The following are presumptions: . . . (x) The law has been obeyed."); see also Cree v. Tannich, 220 Or. 606, 610, 349 P.2d 1094, 1097 (1960) (pedestrian plaintiff had the right to presume that others would be obeying the law and would be operating their vehicles with lights and at a lawful speed).

In response, plaintiff does not challenge the assertion that there is no liability for a failure to warn when the hazard is obvious or known. Rather, plaintiff notes that Oregon Evidence Code 311 does not include a presumption that an individual knows the law; rather, the listed presumption is that the law has been obeyed. Moreover, plaintiff continues, under Oregon Evidence Code

308[2], a judicially created presumption is a rebuttable presumption and plaintiff's asserted facts rebut the presumption.

Plaintiff misses the point. As the Oregon Court of Appeals recently emphasized, "[a]ll persons are presumed to know the law that is relevant to them." Scherzinger v. Portland Custodians Civil Service Bd., --- P.3d ----, 2006 WL 3501237, at *6 (Or. App. Dec. 6, 2006); see also Bartz v. State, 314 Or. 353, 359-60, 839 P.2d 217, 221 (1992) ("It is a basic assumption of the legal system that the ordinary means by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them.:); Dungey v. Fairview Farms, Inc., 205 Or. 615, 621, 290 P.2d 181, 184 (1955) ("Every person is presumed to know the law[.]").

Defendant does not argue that plaintiff's claim fails because defendant is entitled to an evidentiary presumption that plaintiff would comply with the law. Defendant argues that because the law provides a presumption that the law will be obeyed, it necessarily follows that the requirements of the law are generally known or obvious. Thus, under Oregon law, no warning was required. I agree with defendant. Plaintiff's claim fails because the "hazard," the OLCA, which was duly promulgated and published by the Oregon Legislature, is generally known and obvious and plaintiff is presumed to know and obey the law. Thus, defendant owed no duty to warn plaintiff about such a "hazard."

---

[2] OEC 308 provides that "In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

Second, in a failure to warn negligence case, a plaintiff must show that a merchant's conduct fell below the acceptable standard of care. E.g., Griffith v. Blatt, 158 Or. App. 204, 214, 973 P.2d 385, 390 (1999) (plaintiff's claim for negligent failure to warn failed because plaintiff did not submit evidence establishing the requisite standard of care for pharmacists prescribing prescription drugs), aff'd in part, rev'd in part, 334 Or. 456, 51 P.3d 1256 (2002); cf. Glover v. BIC Corp., 6 F.3d 1318, 1325 (9th Cir. 1993) (en banc) (plaintiff met burden of establishing a breach of the standard of care by showing, inter alia, that no reasonable lighter manufacturer would sell a lighter which failed to meet "ASTM" standards for extinguishment).

Defendant states that it is unaware of any California merchant which provides warnings to its customers about the laws of foreign states. Berry Declr. at ¶ 13. Additionally, in the pleadings filed in the criminal case in Oregon state court, plaintiff admitted that he purchased alcoholic beverages from another California merchant on the same day that he purchased the alcohol from defendant and no warning was given. Exh. 1 to Olson Declr.

Plaintiff offers no argument, and more importantly, no evidence in response to this argument. Thus, I agree with defendant that plaintiff has failed to create an issue of fact on the question of whether defendant's conduct fell below the acceptable standard of care. Accordingly, because the "hazard" was obvious, and because plaintiff fails to show that defendant's conduct breached the standard of care, I grant defendant's motion for summary judgment on the negligence claim.

B. Intentional Infliction of Emotional Distress Claim

To sustain an intentional infliction of emotional distress claim, plaintiff must show that defendant intended to inflict severe emotional distress, that defendant's acts were the cause of plaintiff's severe emotional distress, and that defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. McGanty v. Staudenraus, 321 Or. 532, 563, 901 P.2d 841, 849 (1995).

Plaintiff contends that defendant acted with reckless and outrageous indifference to the highly unreasonable risk of criminal prosecution of its members in order to bolster its profits by deliberately failing to advise its members of the possibility of criminal prosecution. Compl. at ¶ 10. Although in the Complaint, or even in the proposed Amended Complaint, plaintiff does not allege that he actually suffered severe emotional distress, plaintiff submits a belated declaration in which he describes the emotional distress he allegedly suffered as a result of the arrest and criminal prosecution for his violation of the OLCA. Dec. 18, 2006 Declr. of Robert Mayorga. I incorporate the declaration into the summary judgment record.

Nonetheless, I grant summary judgment to defendant on this claim because as a matter of law, defendant's conduct was not severe or outrageous. As noted above, to sustain his claim, plaintiff must show that defendant's action "constituted an extraordinary transgression of the bounds of socially tolerable conduct." Babick v. Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059, 1063 (2002) (internal quotation omitted). Conduct that is merely "rude, boorish, tyrannical, churlish, and mean" does not support an IIED claim. Patton v. J.C. Penney Co., 301 Or. 117,

124, 719 P.2d 854, 858 (1986). Thus, Oregon courts have refused to find liability where an employee was terminated for refusing to pull down his pants, Madani v. Kendall Ford, Inc., 312 Or. 198, 205-06, 818 P.2d 930, 934 (1991), or where the employer threw a tantrum, screamed and yelled at his employees, accused them of being liars and saboteurs, and then fired them all. Watte v. Maeyens, 112 Or. App. 234, 237, 828 P.2d 479, 480-81 (1992).

Here, defendant did nothing more than participate in a lawful sale of consumer goods. As a matter of law, such conduct does not rise to the level actionable in a claim of intentional infliction of emotional distress. I grant defendant's motion as to this claim.

II. Motion to Amend

In his motion to amend, plaintiff seeks to add a claim of common law indemnity as follows:

> Plaintiff realleges the facts alleged in paragraphs one through eleven, above. In defending against the criminal case in the Oregon Circuit Court, Plaintiff obtained a favorable ruling, pending appeal, which benefits Costco as well.
> Under the totality of the circumstances alleged herein, arising out of Costco's failure to warn of the consequences attached to its sale of alcoholic beverages to Plaintiff aforesaid, responsibility should rest upon Costco rather than Plaintiff, and Costco has a duty to indemnify Plaintiff thereby. Plaintiff is entitled to indemnification for all of Plaintiffs [sic] expenses arising out of the arrest, confiscation and criminal defense in connection with the alleged violation of the Oregon Liquor Control Act in an amount to be proved at trial, not to duplicate any other amount recovered herein.

Exh. 1 to Mtn to Amend at ¶ 13.

In support of the motion, plaintiff argues that not only did defendant locate its Redding store to take advantage of the interstate traffic traveling to and from Oregon, but it

intentionally marketed, through prices less than those charged by the OLCC, large quantities of alcoholic beverages in competition with the OLCC knowing it was a crime for its members to enter Oregon with their purchases.

Plaintiff notes that defendant rejected plaintiff's tender of his criminal case to defendant. He argues that defendant inequitably reaps the benefit of his successful defense and thus, he seeks leave to assert a claim for indemnification.

In response, defendant contends that the motion should be denied because the claim is futile. To state a claim for common law indemnity in Oregon, plaintiff must show that: "(1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to a third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter." Stovall v. Oregon Dep't of Transp., 324 Or. 92, 127, 922 P.2d 646, 665 (1996).

"The last requirement means that, although the claimant must have been legally liable to the injured third party, his liability must have been 'secondary' or his fault merely 'passive,' while that of the defendant must have been 'active' or 'primary.'" Maurmann v. Del Morrow Const., Inc., 182 Or. App. 171, 177 48 P.3d 185, 188 (2002). A common law indemnity claim cannot be sustained if the defendant could not have been liable to the third party for the legal obligation satisfied by the claimant. See Stovall, 324 Or. at 127, 922 P.2d at 665 (claim for common law indemnity failed as a matter of law when there was no liability by defendants for the breach of contract); Huff v. Shiomi, 73 Or. App. 605, 609 699 P.2d 1178, 1180-81 (1985).

I agree with defendant that plaintiff fails to establish any of the required elements of an indemnity claim. First, in the Complaint, plaintiff does not allege that he discharged a legal obligation owed to a third party. But, in the briefing of this motion and at oral argument, plaintiff has contended that he discharged a legal obligation to a third party, the state, by appearing as a criminal defendant in Douglas County and defending against the charges.

Plaintiff cites no cases in support of this novel proposition that a person or entity should be required to indemnify a person for the person's criminal liability as opposed to a civil liability. Without some authority for plaintiff's argument, I decline to adopt it.

Second, I reject plaintiff's argument that defendant itself would have been liable to the state under O.R.S. 161.155, which makes a person criminally liable for the conduct of another in certain circumstances, including possessing an intent to promote the commission of the crime. Under plaintiff's theory, under O.R.S. 161.155, defendant could have been charged with violating O.R.S. 471.405 because defendant is not an OLCC-authorized outlet for distilled alcoholic beverages, it intended to sell large quantities of alcoholic beverages exceeding Oregon's legal limit, and it intended for those alcoholic beverages to be imported into Oregon by its members. Plaintiff contends that this argument is supported by his Stipulated Facts #s 3, 4, 5, 7, and 8.

I disagree. The stipulated facts do not create a reasonable inference that defendant intended that its customers violate the law. The facts show that defendant engaged in conduct to support

a perfectly legitimate method to compete with the OLCC by siting its store where it did and by selecting certain prices for its alcoholic beverage products. But, as long as customers purchased less than the amount regulated by the OLCC for importation, there is no violation of the law. And if an Oregon resident purchased even more than that amount, there is still no violation of the law if it is not imported to Oregon. Given the number of legal ways that the alcohol can be sold, the stipulated facts do not reveal an intent by defendant for its customers to violate Oregon law. Thus, plaintiff cannot sustain the second element of an indemnity claim requiring him to show that defendant was liable to the third party.

Third, under the facts in the record, I cannot accept plaintiff's argument that his conduct should be viewed as passive and innocent because of defendant's competition with the OLCC. As noted above, it is not illegal for defendant to compete with the OLCC. Plaintiff's conduct cannot be viewed as secondary or passive.

Because plaintiff cannot establish an indemnity claim, it would be futile to allow him to amend his Complaint to add such a claim. Thus, I deny the motion to amend.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

CONCLUSION

Defendant's motion for summary judgment (#6) is granted. Plaintiff's motion to amend (#32) is denied.

IT IS SO ORDERED.

Dated this 24th day of January, 2007.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge